



DEPARTMENT OF EDUCATION

[Docket ID ED-2023-OPE-0029]

Request for Information Regarding First Amendment and Free Inquiry Related Grant Conditions

AGENCY: Office of Postsecondary Education, U.S. Department of Education

ACTION: Request for Information

SUMMARY: The U.S. Department of Education (Department) is requesting information in the form of written comments that may include information, research, and other input from the public on how regulations adding material conditions relating to First Amendment freedoms and free inquiry to Department grants have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court and institutional policies on freedom of speech. The Office of Postsecondary Education solicits these comments to inform its review of the current regulations and its implementation of applicable grant programs.

DATES: We must receive your comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments must be submitted via the Federal eRulemaking Portal at [regulations.gov](https://www.regulations.gov). However, if you require an accommodation or cannot otherwise submit your

comments via [regulations.gov](https://www.regulations.gov), please contact the program contact person listed under FOR FURTHER INFORMATION CONTACT. The Department will not accept comments by fax or by email, or comments submitted after the comment period closes. To ensure that the Department does not receive duplicate copies, please submit your comments only once. Additionally, please include the Docket ID at the top of your comments.

Federal eRulemaking Portal: Go to www.regulations.gov to submit your comments electronically. Information on using [Regulations.gov](https://www.regulations.gov), including instructions for accessing agency documents, submitting comments, and viewing the docket, is available on the site under "FAQ."

Privacy Note: The Department's policy is to make all comments received from members of the public available for public viewing in their entirety on the Federal eRulemaking Portal at www.regulations.gov. Therefore, commenters should be careful to include in their comments only information that they wish to make publicly available.

This is a request for information (RFI) only. This RFI is not a request for proposals (RFP) or a promise to issue an RFP or a notice of proposed rulemaking. This RFI does not commit the Department to contract for any supply or service whatsoever. Further, we are not seeking proposals and will not accept unsolicited proposals. The Department will not pay for any information or

administrative costs that you may incur in responding to this RFI. The documents and information submitted in response to this RFI become the property of the U.S. Government and will not be returned.

FOR FURTHER INFORMATION CONTACT: Ashley Clark,
U.S. Department of Education, 400 Maryland Ave., SW, Room
2C185, Washington, DC 20202. Telephone: (202) 453-
7977. Email: ashley.clark@ed.gov.

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7-1-1.

SUPPLEMENTARY INFORMATION:

I. Background

In 2020, the Department proposed and issued final regulations to add material conditions relating to First Amendment freedoms and free inquiry to certain Department grants. These regulations, commonly referred to as the "Free Inquiry Rule," added provisions related to free inquiry (§ 75.500(b) and (c) for Direct Grant Programs, and § 76.500(b) and (c) for State-Administered Formula Grant Programs), making it a material condition of these Department grants that public institutions of higher education (IHEs) that receive these grants comply with the First Amendment and private institutions that receive grants from the Department follow their stated institutional policies on freedom of speech, including

academic freedom. As acknowledged in the 2020 final rule, public IHEs are already legally required to comply with the First Amendment and private IHEs are required to comply with their stated policies on freedom of speech. The intended effect of making compliance a material condition of receiving Department grants is to encourage IHEs to foster environments that promote open, intellectually engaging, and diverse debate.

The 2020 final rule states that an IHE will be determined to have violated the grant conditions in §§ 75.500(b) and (c) and 76.500(b) and (c) only if a State or Federal court issues a final, non-default judgment against a public IHE for violating the First Amendment or against a private IHE for violating stated institutional policies. In the 2020 NPRM and 2020 final rule, the Department stated that we believed State and Federal courts are the appropriate arbiters of alleged free speech violations. Under the 2020 final rule, the Department's role is deciding whether and to what extent to impose additional penalties where such court judgments have been rendered, including, but not limited to, withholding Federal grant funding. The preamble to the 2020 final rule stated that if a court issues such a judgment against a public IHE for violating the First Amendment or a private IHE for violating stated institutional policies, the institution must submit to the Secretary a copy of the judgment within

45 days. The Department would then consider such a grantee to be in violation of a material condition and could pursue available remedies for noncompliance.

Furthermore, the 2020 final rule added a third provision (§ 75.500(d) for Direct Grant Programs and § 76.500(d) for State-Administered Formula Grant Programs) prohibiting public IHEs from denying to a religious student organization at the public institution any right, benefit, or privilege that is otherwise afforded to other student organizations at the institution because of the religious student organization's beliefs, practices, policies, speech, membership standards, or leadership standards informed by sincerely held religious beliefs. That provision is not part of this request for information and is instead being addressed separately in a notice of proposed rulemaking (see Docket ID ED-2022-OPE-0157).

II. Review of 34 CFR §§ 75.500 and 76.500, paragraphs (b) and (c)

On August 19, 2021, the Department issued a blog post announcing that we were conducting a review of these regulations while keeping in mind the importance of several key elements, including First Amendment protections, nondiscrimination requirements, and the promotion of inclusive learning environments for all students.¹ We

¹ Cooper, Michelle Asha. "Update on the Free Inquiry Rule," Department of Education Homeroom Blog (Aug. 19, 2021), <https://blog.ed.gov/2021/08/update-on-the-free-inquiry-rule/>.

stated in our blog post that the First Amendment requires that public colleges and universities not infringe upon students' rights to engage in protected free speech and religious exercise and emphasized our long-held and continuing view that "[p]rotecting First Amendment freedoms on public university and college campuses is essential." The Department further recognized that IHEs, their students, and the courts have historically been responsible for resolving disputes relating to these complex matters where these important principles intersect.

As part of the review, the Department conducted outreach and held meetings with higher education and institutional stakeholders, including organizations representing minority-serving institutions and other under-resourced institutions; faith-based organizations, including organizations representing religious IHEs; and organizations that advocate for civil rights and civil liberties. The purpose of the meetings was to hear from impacted groups that had diverging perspectives in their comments on the proposed provisions in the 2020 NPRM. Some institutional stakeholders raised on-going concerns that the provisions added by the 2020 final rule in paragraphs (b) and (c) of 34 CFR §§ 75.500 and 76.500 unnecessarily go beyond what is required by the courts, encourage campus community members to pursue litigation more frequently, and undermine existing campus processes. Stakeholders also

stated that these provisions could increase institutional costs as a result of increased litigation and prompt institutions to change their approach to litigation, such as being more likely to settle. In the case of private institutions, the Department has heard concerns that the regulations may incentivize private colleges to limit, eliminate, or reconsider their policies on free speech for fear of losing grant funds. Some stakeholders indicated support for these provisions and stated that the regulation helps secure crucial civil liberties under the First Amendment.

**III. Solicitation of Comments: Impact of 34 CFR §§
75.500 and 76.500, paragraphs (b) and (c)**

The Biden-Harris Administration deeply values the First Amendment, including its guarantees of free speech and free exercise. The Department is seeking input from the public on how the regulations have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court and institutional policies on freedom of speech. The Department is interested in this public input to inform its review of the current regulations and its implementation of applicable grant programs. This effort is separate from any ongoing regulatory work. The deadline for these submissions is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

The Department encourages comments from impacted institutions of higher education; researchers, academics, policy experts, and other individuals familiar with First Amendment rights and institutional policies; organizations that work on First Amendment issues, including those that work directly with institutions and students; students and other members of the public.

The Department seeks responses to the specific questions below, as well as the general concepts and topics identified as they relate to First Amendment rights and free speech policies on campus.

The Department invites comments as to:

1. Whether and how the current regulations have affected or are reasonably expected to affect decisions surrounding First Amendment and free speech-related litigation in Federal and State court;
2. How these regulations have affected or are reasonably expected to affect public IHEs' approach to designing institutional policies related to First Amendment protections, including on-campus processes used to address alleged free speech and academic freedom violations;
3. How these regulations have affected or are reasonably expected to affect private IHEs' approach to designing institutional policies

related to free speech and academic freedom,
including on-campus processes used to address
alleged free speech and academic freedom
violations;

4. Whether and how these grant conditions have
provided additional protections of First
Amendment rights in the case of public colleges,
or promotion of free speech and free inquiry
policies in the case of private institutions;
5. Whether these regulations affect or could be
expected to affect how aggrieved campus community
members seek resolution to alleged free speech
and academic freedom policy violations;
6. Whether these regulations have resulted in
additional quantifiable costs beyond what was
considered in the 2020 final rule;
7. Any other information that the public believes
would inform the Department's understanding of
the impact of these regulations.

Accessible Format: On request to the program contact
person listed under FOR FURTHER INFORMATION CONTACT,
individuals with disabilities can obtain this document in
an accessible format. The Department will provide the
requestor with an accessible format that may include Rich
Text Format (RTF) or text format (txt), a thumb drive, an

MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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Nasser H. Paydar,
Assistant Secretary,
Office of Postsecondary
Education.

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